

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2217 of 1981

For Approval and Signature:

Hon'ble THE CHIEF JUSTICE MR. K.SREEDHARAN and
MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge?
No

P I DANI

Versus

STATE OF GUJARAT

Appearance:

MR MR ANAND for Petitioners
MR KM MEHTA, AGP for M/S A & D for Respondent No. 1

CORAM : THE CHIEF JUSTICE MR. K.SREEDHARAN and
MR.JUSTICE M.S.SHAH

Date of decision: 25/11/97

CAV JUDGEMENT

(PER M.S.SHAH J.) :

This petition under Article 226 of the Constitution is filed by three Electrical Sub-inspectors,

who are diploma holders, and their Association for challenging the statutory recruitment rules for the post of Assistant Electrical Inspector in so far as the said rules make a distinction between the degree holders and the diploma holders in the matter of promotion to the cadre of Assistant Electrical Inspectors.

2. The petitioners are working in the Electrical Inspectorate under the Industries, Mines and Power Department of the State of Gujarat. They possess the qualification of diploma in electrical engineering and were recruited on the posts of Supervisor, which posts were redesignated as Electrical Sub-Inspectors, on 30.11.1966, 20.4.1967 and 3.10.1968 respectively. Recruitment to the higher post of Assistant Electrical Inspector is governed by the Assistant Electrical Inspector Recruitment Rules, 1968 (hereinafter referred to as the Rules) as amended by the Government Notifications dated October 20, 1977 and April 6, 1981. Promotion to the post of Assistant Electrical Inspector is to be made by promotion of persons of proved merit and efficiency-

- (i) from amongst the persons working as Junior Assistant Electrical Inspectors (i.e. degree holders) for a period of about four years, or
- (ii). from amongst the persons working as Electrical Sub-Inspectors (i.e. diploma holders) for a period of about six years.

The aforesaid statutory rules as amended by notification dated October 20, 1977 also provide for ratio of 2:1 for degree holders and diploma holders. By notification dated April 6, 1981 the aforesaid ratio was given retrospective effect with effect on and from August 26, 1975.

The present petition challenges the constitutional validity of the aforesaid recruitment rules in so far as they provide for ratio of 2:1 in favour of the degree holders and longer eligibility period for diploma holders in the matter of promotion to the post of Assistant Electrical Inspector.

3. As per the Assistant Electrical Inspectors Recruitment Rules contained in Government Resolution dated December 2, 1968, both the degree holders and the diploma holders were eligible for promotion to the post of Assistant Electrical Inspector though the degree holders were required to have at least four years'

experience and the diploma holders were required to have at least six years' experience. In the year 1975, by Government Resolution dated August 26, 1975 the Government prescribed ratio of 2:1 for degree holders and diploma holders respectively for promotion to the post of Assistant Electrical Inspectors. Special Civil Application No. 2140 of 1975 came to be filed for challenging the aforesaid ratio. During pendency of the said petition Government issued notification dated October 20, 1977 promulgating Assistant Electrical Inspector Recruitment (Amendment) Rules, 1977 incorporating into the statutory recruitment rules the ratio of 2:1 for degree holders and diploma holders over and above the differential eligibility criteria for promotion to the post of Assistant Electrical Inspector from amongst the degree holders and diploma holders.

The aforesaid petition came to be decided by a Division Bench of this Court holding that the differentiation between the degree holders and diploma holders in the matter of eligibility criteria prescribing longer length of service for diploma holders (six years) as compared to degree holders (four years) and the ratio of 2:1 was valid but the statutory amendment rules of 1977 could not be given retrospective effect as on their plain language they were not retrospective.

After the aforesaid judgment delivered by this Court on March 31, 1980, the Government issued Notification dated April 6, 1981 (Annex.F.) in exercise of the power conferred by proviso to Article 309 of the Constitution for amending the Assistant Electrical Inspector Recruitment Rules, 1968 so as to give retrospective effect to the 1977 amendment with effect on and from August 26, 1975.

4. The learned Counsel for the petitioners has challenged the aforesaid recruitment rules as amended by 1977 amendment and further amended by 1981 amendment on the following grounds:

(1). The Government could not have given retrospective effect to the Amendment Rules of 1977 with effect on and from August 26, 1975 once this Court had held that Amendment Rules of 1977 were not retrospective.

(2). The discrimination against the diploma holders in the matter of ratio of 2:1 in favour of the degree holders and the longer eligibility period for the diploma holders' in the matter of

promotion to the post of Electrical Assistant Inspector was arbitrary and violative of Articles 14 and 16 of the Constitution, especially in view of the decisions of the Apex Court in the case of Mohammad Shujat Ali and ors. Vs. Union of India and ors. AIR 1974 SC 1631 and in the case of Punjab Electricity Board vs. Ravinder Kumar Sharma, 1986 (4) SCC 617.

(3). In respect of promotion to the cadre of Deputy Engineers in the Public Works Department, a Division Bench of this Court had held in Special Civil Application NO.1606 of 1975 that the fixation of quota so as to discriminate against diploma holders was unconstitutional and, therefore, the same reasoning and conclusion should apply in the instant case in respect of the present cadre also, as the Electrical Inspectorate earlier was a part of the Public Works Department.

5. On the other hand Mr.K.M.Mehta, learned Assistant Government Pleader has submitted that -

(i) these very recruitment rules were earlier challenged on two occasions in Special Civil Application No.342/71 filed by a diploma holder a division bench of this Court on August 2/3, 1972 upheld the constitutional validity of the Assistant Electrical Inspector Recruitment Rules, 1968 providing that the degree holders shall have put in at least four years' service as whereas the diploma holders must have put in at least six years' service.

(ii) Subsequently, in Special Civil Application No.2140 of 1975 also another Division Bench of this Court upheld the constitutional validity of the same statutory rules as amended by the Notification dated October 20, 1977. By the said amendment two changes were made -

(a) the eligibility criteria of at least four years in the case of degree holders and at least six years in the case of diploma holders was changed to about four years for the degree holders and about 6 years for diploma holders;

(b) the ratio of promotion from amongst the degree holders and diploma holders was

provided at 2:1 which was earlier contained in Government Resolution dated August 26, 1975.

(iii) better deal for degree holders as against diploma holders in the matter of promotion to a higher post has been upheld to be valid by the Apex Court in a catena of decisions, and

(iv) all that the Government had done by issuing Government Notification dated April 6, 1981 was to give retrospective effect to the ratio of 2:1 with effect on and from August 26, 1975 on which date the earlier executive instructions in the form of a Government Resolution were issued and that there was nothing unconstitutional about the said amendment of 1981 effected in exercise of the powers conferred by the proviso to Article 309 of the Constitution.

6. We have given thoughtful consideration to the submissions made by the learned Counsel for the parties. In our view, since the constitutional validity of the statutory recruitment rules being Assistant Electrical Inspector Recruitment Rules, 1968 as amended by the Assistant Electrical Inspector Recruitment (Amendment) Rules 1977 was already examined and upheld by two Division Benches of this Court in the aforesaid two decisions in Special Civil Application Nos. 342/71 and 2140/75, the issues covered by those two decisions cannot be permitted to be reopened. The learned Counsel for the petitioners has however, vehemently submitted that since in case of another similar cadre in the Public Works Department a Division Bench of this Court had rendered a decision dated 26-3-1980 in Special Civil Application No.1606/75 striking down the ratio in favour of the degree holders, this Court should reexamine the entire matter afresh.

In our view, it is not permissible to accept the said submission; firstly because the validity of these very statutory rules was upheld by this Court prior to the amendment of 1977 and also after the amendment of 1977. Secondly, the validity of such recruitment rules has to be examined on the facts and in the circumstances of each particular cadre and, therefore, the binding decision for a particular cadre cannot be reconsidered merely on the ground that this Court had taken another view in respect of another cadre.

7. As regards strong reliance placed by the learned

Counsel for the petitioners on the decisions in the case of Mohammad Shujat Ali (*supra*) and Punjab State Electricity Board Vs. Ravinder Kumar Sharma (1986) 4 SCC 617, it is required to be noted that since 1974 there were two lines of decisions.

In State of Jammu & Kashmir Vs. Troloki Nath Khosa and others, AIR 1974 SC 1 a Constitution Bench of the Apex Court held that the rule providing that graduates shall be eligible for promotion to the cadre of executive engineer to the exclusion of the diploma holders does not violate Articles 14 and 16 of the Constitution. The rule was upheld on the ground that though formal education may not always produce excellence but a classification founded on variant educational qualification is, for purposes of promotion to the post of an Executive Engineer, to say the least, not unjust on the face of it and the onus therefore, cannot shift from where it originally lay and that the duty to establish its unconstitutionality suitability was on the person challenging such qualification. It was held in that case that the petitioners had failed to discharge the onus. This decision was followed in a number of subsequent cases.

However, in the same year another Constitution Bench of Apex Court in the case of Mohamad Shujat Ali and others Vs. Union of India and others, AIR 1974 SC 1631 held that while it may be perfectly legitimate for the administration to say that having regard to the nature of the functions and duties attached to the post, for the purpose of achieving efficiency in public service only degree holders in engineering shall be eligible for promotion and not diploma or certificate holders, but where graduates and non-graduates are regarded as fit and therefore, eligible for promotion, it is difficult to see how, consistently with the claim of equal opportunity, any differentiation can be made between them by laying down a quota of promotion for each and giving preferential treatment to to graduates over non-graduates in the matter of fixation of such quota. This decision came to be followed in the case of Punjab Electricity Board (*supra*).

9. Whenever the controversy arose regarding discrimination in favour of the degree holders, on behalf of the degree holders reliance would be placed on Khosa's case (*supra*) and on behalf of the diploma holders reliance would be placed on Mohd. Shujat Ali's case. In the trend setting decision in the case of Roop Chand Adlakha Vs. Delhi Development Authority, 1989 (1) SCC

116 the Apex Court held that though on the justification of job-requirements and in the interest of maintaining a certain quality of technical expertise in the cadre diploma holders can be validly be excluded from the eligibility for promotion to the higher cadre, it does not necessarily follow as an inevitable corollary that the choice of the recruitment policy is limited to two, namely, either to consider them eligible or not-eligible. The Apex Court then observed that the State is not precluded from conferring eligibility on diploma-holders conditioning it by other requirements like varying period of length of experience, which in the case of Roop Chand was 10 years for the diploma holders and 8 years for degree holders. It was held that Article 16 would not prevent the State from formulating a policy which prescribes as an essential part of the conditions for the very eligibility that the candidate must have a particular qualification plus a stipulated quantum of service experience. The rule laying down different period of service experience for diploma holders and degree holders was not found violative of Articles 14 and 16 of the Constitution.

Similarly, in the case of P.Murugesan Vs. State of Tamil Nadu, (1993) 2 SCC 340 a three Judge Bench after considering both Khosa case and Shujat Ali case observed that if the diploma holders can be barred altogether from promotion it was difficult to appreciate how and why the rule making authority was precluded from restricting the promotion. It was pointed out that the rule making authority may be of the view having regard to the efficiency of the administration and other relevant circumstances, that while it is not necessary to bar the diploma holders from promotion altogether, their chances of promotion should be restricted. Hence in that decision the Apex Court upheld the ratio of 3:1 between degree holders and diploma holders.

10. All these decisions and various other subsequent decisions on this issue have been threadbare considered by the Apex Court in the case of T.R.Kothandaraman Vs. T.N.Water Supply and Drainage Board, (1994)6 SCC 282. After an exhaustive review of the case law on the subject, the following principles have been laid down by the Apex Court in the said decision :-

" the following legal propositions emerge regarding educational qualification being a basis of classification relating to promotion

in public service:

- (1). Higher educational qualification is a permissible basis of classification, acceptability of which will depend on the facts and circumstances of each case.
- (2). Higher educational qualification can be the basis not only for barring promotion, but also for restricting the scope of promotion.
- (3). Restriction placed cannot however go to the extent of seriously jeopardizing the chances of promotion. To decide this, the extent of restriction shall have also to be looked into to ascertain whether it is reasonable."

In view of the aforesaid pronouncement of law by the Apex Court, there is no need to reconsider the two previous decisions of this Court in respect of these very statutory Recruitment Rules. There can be no hesitation in holding that the distinction between the degree holders and the diploma holders in the matter of promotion to the cadre of Assistant Electrical Inspectors is valid both in so far as the statutory recruitment rules provide for longer eligibility criteria of six years for diploma holders as against four years for degree holders and also in the matter of ratio of 2:1 in favour of the degree holders. It is clear that the recruitment rules have not kept the diploma holders out of the fray for consideration for promotion to the higher cadre but they have merely restricted the scope of promotion without seriously jeopardizing the chances of promotion. As per the settled legal position, the Court must first proceed on the basis of the presumption that the recruitment rules framed in exercise of the powers under Article 309 are constitutional. The onus of proving unconstitutionality of such rules is on the petitioners. There is no material on record to show that the chances of promotion of the diploma holders are seriously jeopardized by the aforesaid features of the recruitment rules. It must, therefore, be held that the challenge to the recruitment rules for the post of Assistant Electrical Inspectors as contained in the Government Notification dated December 2, 1968 and amended by the rules contained in the notification dated October 20, 1977 must fail.

12. That brings us to the last contention regarding validity of the notification dated April 6, 1981 containing the Amendment Rules of 1981 giving retrospective effect to the Amendment Rules of 1977. Now, as far as the 1977 Amendment Rules are concerned, as stated above, the amendment in respect of the length of service for degree holders and diploma holders has remained the same - four years for degree holders and six years for diploma holders. Only the words "at least" have been changed for the word "about". Even according to the petitioners, this amendment has not brought about any significant change in the situation.

As regards the serious objection against giving retrospective effect to the fixation of ratio of 2:1 for the degree holders and diploma holders respectively with effect from August 26, 1975, it is required to be noted that the aforesaid ratio was already fixed by the Government Resolution dated August 26, 1975 but since the statutory Amendment Rules of 1977 were prospective and not retrospective, this Court had earlier declared that the Amendment Rules of 1977 were prospective and, therefore, cannot be implemented with retrospective effect. The Government, therefore, brought in the statutory amendment in 1981 for giving retrospective effect to the 1977 amendment with effect from August 26, 1975, and on the basis thereof the Government has published seniority lists of degree holders and diploma holders as on 31.10.1975 at Annexure "G" Colly. for the purpose of giving effect to the ratio of 2:1. The petitioners have challenged the said lists also.

As per the settled legal position the Government can make retrospective rules in exercise of the power conferred by the proviso to Art.309 of the Constitution, if such retrospective amendment does not take away the vested rights of the parties. The petitioners have not been able to show as to how they had any vested right which has been taken away by giving retrospective effect to the aforesaid amendment. The petitioners were recruited as Electrical Sub-Inspectors between 1965 and 1968 and under the Recruitment Rules for the post of Assistant Electrical inspector, they had merely a right for being considered for promotion after putting in six years of service in the cadre of Electrical sub-inspectors. They were not promoted to the higher post of Assistant Electrical Inspector prior to October 20, 1977. Even persons promoted on a temporary basis may suffer detriment on account of the retrospective amendment of the statutory rules but that would not amount to taking away any vested right. It is true that

on account of the aforesaid retrospective effect, there would be reshuffling of seniority of persons eligible and due for promotion to the cadre of Asstt. Electrical Inspectors after August 25, 1975, but as held by the Apex Court in the case of S.S.Bola and others Vs. B.D.Sardana and others, AIR 1997 SC 3127 , to have a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a Government servant and losing some places in the seniority list within the cadre does not amount to reduction in rank even though the future chances of promotion get delayed thereby. In that case there was a dispute about the seniority between direct recruits and promotees resulting from retrospective amendment of the recruitment rules. The Supreme Court did not accept the plea that the effect of redetermination of the seniority in accordance with the provisions of the Act is not only that the direct recruits lose a few places of seniority in the rank of Executive Engineer but their future chances of promotions are greatly jeopardized and that right having been taken away the Act must be held to be invalid. It has been held that since chances of promotion of Government servant are not a condition of service the direct recruits did not have a vested right nor any right had accrued in their favour in the matter of getting a particular position in the seniority list of Executive Engineers under the pre-amended rules which is said to have been taken away by the Act since such a right is neither a vested right of an employee nor can it be said to be an accrued right. Thus, there is no bar for the legislature to amend the law in consequence of which the inter se position in rank of Executive Engineers might get altered. Consequently there was no invalidity in the enactment of the Haryana Act (20 of 1995).

In the facts of the present case, the petitioners have not been able to make out any case of any vested right being taken away by giving retrospective effect to the Assistant Electrical Inspector Recruitment (Amendment) Rules, 1977 with effect from August 26, 1975. As already stated above, Government had already earlier prescribed the ratio of 2:1 in favour of the degree holder by Government Resolution dated August 26, 1975. Government Notification dated April 6, 1981 was issued in exercise of the power under the proviso to Article 309 of the Constitution only to cure the infirmity that statutory rules cannot be amended by executive instructions. There was, therefore, no unconstitutionality in removing that infirmity. Consequently, the lists at Annexure "G" Colly. were issued in order to implement the ratio with effect from

August 26, 1975.

13. In view of the aforesaid discussion there is no substance in any of the contentions urged on behalf of the petitioners. The petition is accordingly dismissed.

14. Rule is discharged with no order as to costs.

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Sd/- (K. Sreedharan, CJ)

Sd/- (M.S. Shah, J.)